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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 692

JAMES T. SPENCER, ADMINISTRATOR OF THE ESTATE OF JACKSON BARNETT,

Petitioner,

vs.

GYPSY OIL COMPANY, A CORPORATION; GULF OIL COMPANY, A CORPORATION; F. A. GILLESPIE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinion below. (142 F. (2d) 935	2
Jurisdiction	2
Questions presented	2
Statutes and constitutional provisions involved	4
Statement	6
Specification of errors to be urged	14
Reasons for granting the writ	15
Brief in support of petition	22
Argument	22
Point I	23
Point II	28
Point III	34
Conclusion	36

Table of Cases Cited

Adams v. *Osage Tribe of Indians*, 50 F. (2d) 918	30
American Radium Co. v. *Hipp*, 279 Fed. 601	19
Baton Rouge, City of v. *Baton Rouge Water Works Co.*, 30 F. (2d) 895	19
Bell v. *Fitzpatrick*, 53 Okla. 574, 157 Pac. 334	15
Bergman v. *Rhodes*, 165 N. E. 598, 65 A.T.R. 344	19
Bolling v. *Campbell*, 36 Okla. 671, 128 Pac. 1091	15
Brewer v. *Dodson*, 60 Okla. 81	15
Colins Investment Co. v. *Beard*, 46 Okla. 310	15
Dexter v. *Hall*, 15 Wall. 9, 21 L. Ed. 73	29
Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 88	30
Fulsom v. *Quaker Oil Co.*, 28 F. (2d) 398	30
General Electric Co. v. *Wabash Appliance Corporation*, 304 U. S. 364	20
Goat v. *United States*, 224 U. S. 458	18
Goodrum v. *Buffalo*, 162 Fed. 817	16, 18, 30

Page

Griffin v. *Galbraith*, 114 Okla. 208, 247 Pac. 339 15
Hanis v. *International Land Co.*, 89 Okla. 163 5
Harjo v. *Johnston*, 187 Okla. 561, 104 Pac. (2d) 985 15
Hathaway v. *Hoffman*, 53 Okla. 72, 153 Pac. 184 31
Heckman v. *United States*, 224 U. S. 413 18
Heyman v. *O'Connell*, 13 N. E. (2d) 100 19
Hodgson v. *Vroom*, 266 Fed. 267 19
Holmes v. *United States*, 33 F. (2d) 688 18
Hommer v. *Brown*, 16 How. (57 U. S.) 354 17
International Railway Co. v. *Davidson*, 257 U. S. 506 20
Jackson Barnett, In re appeal of, 122 Okla. 160 9
Jennings v. *Wood*, 192 Fed. 507 18
Kelly v. *Town of Milan*, 127 U. S. 139, 32 L. Ed. 77 16,19
Long v. *Anderson*, 77 Okla. 95 5
Lowery v. *Richards*, 120 Okla. 261, 248 Pac. 622 15
Magnum Import Co. v. *Coty*, 262 U. S. 159 20
Manhattan Life Ins. Co. v. *Broughton*, 109 U. S. 121 17
Martin v. *O'Reilly*, 81 Okla. 261, 198 Pac. 303 31
Monahawee, State ex rel v. *Hazelwood*, 81 Okla. 69, 196 Pac. 937 31
Mott v. *United States*, 283 U. S. 747 18,20
Neal v. *Travelers Ins. Co.*, 188 Okla. 131, 106 Pac. (2d) 811 15
Norris v. *Dagley*, 64 Okla. 171 5
Royal Indemnity Co. v. *United States*, 313 U. S. 289 20
Russel v. *Place*, 94 U. S. 606 17
Sanders, In re estate of, 67 Okla. 3, 168 Pac. 197 15
Texas & Pacific Ry. Co. v. *Southern Pacific Co.*, 137 U. S. 48 17,28
Tidal Oil Co. v. *Flannegan*, 87 Okla. 231 15
Title & Guaranty Surety Co. v. *Foster*, 84 Okla. 291, 203 Pac. 231 15
Toledo Pressed Steel Co. v. *Standard Parts Inc.*, 307 U. S. 350 20
Tucker v. *Leanord*, 144 Okla. 264, 291 Pac. 124 15
United States v. *Equitable Trust Co.*, 283 U. S. 738 18
Welch v. *Focht*, 67 Okla. 275, 171 Pac. 730 31
Worcester County Trust Co. v. *Riley*, 302 U. S. 292 20
Swift and Co. v. *United States*, 276 U. S. 311 35

Statutes Cited

	Page
Act of March 3, 1901 (31 Stat. 1447)	5
Act of May 27, 1908, Sec. 2 (35 Stat. 312)	2,4,30
Act of April 12, 1926, sec. 3, 44 Stat. 240	9
Constitution of the United States, Fifth Amendment	34
Judicial Code, sec. 240 as amended, sec. 347 Title 28, U. S. C	2
Oklahoma Statutes for 1921, sec. 1449	5,31
Oklahoma Statutes for 1921, sec. 4981	5
Revised Statutes of Oklahoma 1941, Title 12, sec. 279 (1931 Stat., sec. 213)	5,29
Revised Laws of Okla. 1910, sec. 6570	5,31
U.S.C., Title 28, sec. 725	5,30

Text Cited

Freeman v. *Judgments*, 5th Ed., Vol. 1, sec. 354, p. 734	36
Freeman v. *Judgments*, 5th Ed., Vol. 3, Sec. 1350, p. 2773	19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 692

JAMES T. SPENCER, Administrator of the Estate of Jackson Barnett, Deceased,

Petitioner,

vs.

GYPSY OIL COMPANY, a Corporation; GULF OIL COMPANY, a Corporation; F. A. GILLESPIE; F. A. GILLESPIE AND SONS COMPANY, a Corporation; MID-CONTINENT PETROLEUM CORPORATION, a Corporation; MANNFORD OIL AND GAS COMPANY, a Corporation; CUSHING GASOLINE COMPANY, a Corporation; SOUTH-WEST OIL COMPANY, a Corporation; JESSE BARTLETT, Administrator of the Estate of H. U. Bartlett, Deceased,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petition of James T. Spencer, administrator of the estate of Jackson Barnett, deceased, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals of the Tenth Circuit entered in the above-entitled cause May 22, 1944.

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 142 Fed. (2) 935 (R. 823-827).

The opinion of the U. S. District Court is in the record (R. 616-622).

A rehearing was denied June 24, 1944 (R. 863).

The time for filing this petition and brief was on August 30, 1944, by an order of Mr. Justice Black extended to and including October 20, 1944 (R. 865). The further time for filing this petition and brief was on October 11th, 1944, by an order of Mr. Justice Rutledge extended to and including November 20, 1944 (R. 865).

Jurisdiction

The opinion of the Circuit Court of Appeals was filed May 22, 1944 (R. 823-827). Judgment was entered May 22, 1944 (R. 828).

The jurisdiction of this court is invoked under the provisions of Sec. 240 of the Judicial Code as amended by the Act of March 3, 1891, c. 517; Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Sec. 347, Title 28, U. S. C.

Questions Presented

1. Whether the final decree entered in consolidated cause 216 equity in the U. S. District Court on July 11, 1929 (R. 105-107) was, in law and in fact, a consent decree solely based upon a compromise and consent agreement (R. 769-772, 786), or, was it, as held by the Circuit Court of Appeals, a judicial determination of the issues involved in the case in which it was entered.

2. Whether, by the provisions of Sec. 2 of the Act of Congress, approved May 27, 1908 (35 Stat. 312), a U. S.

District Court having jurisdiction of the parties and the subject matter of an action brought by the next friend and guardian *ad litem* on behalf of a restricted, mentally incompetent Indian of the Creek Nation for possession of lands allotted to said Indian, and for cancellation of an oil, gas and mining lease, concededly void by reason of the lack of mental capacity of said Indian to make the same, and for damages for the oil and gas removed by the adversaries of said Indian in the litigation, said U. S. District Court has jurisdiction to enter a compromise consent judgment against said Indian based upon a compromise and consent agreement, even though said compromise agreement is approved by the Secretary of the Interior and by the Attorney General of the United States, and no trial or judicial determination has been had in said court to determine the rights of said mentally incompetent and restricted Indian in his said allotted lands, oil and gas rights, the effect of which consent judgment was to divest said Indian of the title to oil and gas rights in his said allotted lands and to vest the title thereto in his adversaries, and to dismiss with prejudice the action of said Indian and to cancel his claim for the value of the oil and gas removed by his adversaries in said action, and where the Circuit Court of Appeals conceded in its opinion that said Indian was mentally incompetent and could not execute a valid oil and gas lease, and further, that the District Court erred in deciding that the ratification of the oil and gas lease by the representatives of said Indian and its approval by the Attorney General and the Secretary of the Interior gave it validity.

3. Where the guardian *ad litem* and the next friend of a mentally incompetent, restricted Indian consented to a compromise agreement, without more, which divested their ward of title to valuable oil and gas rights and vested title thereto in his adversaries, in litigation; whether the said

guardian *ad litem* and the next friend were vested with lawful authority to bind the mentally incompetent Indian to the terms and conditions of the compromise agreement as set forth in the record of this case (R. 769, 772-785) which was the sole basis, without judicial investigation or determination, for the entry of a final decree and judgment against said mentally incompetent, restricted Indian, assuming to ratify and give validity to the concededly void oil and gas lease of March 5, 1912 (R. 39-46), and to quiet the title to said oil and gas under said restricted lands of said mentally incompetent Indian in respondents, herein, and to dismiss his action with prejudice, although such compromise agreement had, prior to the entry of said final decree, been approved by the Secretary of the Interior and by the Attorney General of the United States.

Statutes and Constitutional Provisions Involved

Sec. 2, Act of Congress, approved May 27, 1908 (35 Stat. 312), providing the exclusive manner under which a restricted member of the Creek Nation of the Five Civilized Tribes and a mentally incompetent can execute a valid oil and gas lease upon his lands.[1]

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[1] "Sec 2. That all lands, other than homesteads, allotted to members of the Five Civilized Tribes from which restrictions have not been removed, may be leased by the allottee, if an adult, or by guardian or curator under the order of the proper probate court, if a minor or incompetent, for a period not to exceed five years without the privilege of renewal: Provided, that a lease of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, and not otherwise; and provided, further that the jurisdiction of the probate court of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions and the term "minor" or "minors", as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Act of March 3, 1901 (31 Stat. 1447) making all Indians who are members of the Five Civilized Tribes citizens of the United States.

The Fifth Amendment to the Constitution of the United States, providing for the due process clause.

Revised Statutes of Oklahoma 1941, Title 12, Sec. 279 (1931 Stat., Sec. 213), providing that a guardian *ad litem* shall plead all defenses in behalf of his ward.[2]

Sec. 4981 Oklahoma Statutes for 1921, defining the capacity of persons incompetent to make contracts.[3]

Sec. 1449 Oklahoma Statutes for 1921.[4]

Sec. 725, Title 28, U. S. C.[5]

Sec. 6570 Revised Laws of Okla. 1910.[6]

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2 "The guardian of an infant or a person of unsound mind, or attorney for a person in prison, shall deny, in the answer, all material allegations of the petition prejudicial to such defendant."

3 "* * * A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him, necessary to his support, or the support of his family." See *Hains* v. *International Land Co.*, 89 Okla. 163; *Long* v. *Anderson*, 17 Okla. 95; *Norris* v. *Dagley*, 64 Okla. 171.

4 "When it is represented to the county court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of the hearing the case, not less than five days before the time so appointed, and such person if able to attend, must be produced before him on the hearing."

5 "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

6 "6570. *Guardian for Non-resident Ward.* When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state, and has estate therein, any friend of such person or anyone interested in his estate, in expectancy or otherwise, may apply to the county judge of any county in which there is any estate of such absent person, for the appointment of a guardian; and if after notice given to all interested, in such manner as the judge orders, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed."

Statement

This action was commenced in the U. S. District Court for the Northern District of Oklahoma on November 2, 1938, by petitioner against respondents, being No. 39 Civil (R. 6-39) and is an action in the nature of an ancillary suit to vacate and void what is termed a consent and final decree entered on July 11, 1929, in said Court in cause No. 216 Equity Consolidated, which consolidated cause consisted of a suit instituted by Jackson Barnett, a mentally incompetent, restricted Indian of the Creek Nation by Fred T. Hildt, his next friend, against Gypsy Oil Company and others, respondents herein, and cause No. 260 Equity being an action instituted by the Gypsy Oil Company and others, respondents herein, against Jackson Barnett, defendant, a copy of which final decree above referred to is in the record (R. 105-107); and for a judgment and order of said District Court finding and adjudging void and unauthorized a compromise agreement entered into by and between the next friend for Jackson Barnett, incompetent, in cause No. 216 Equity, and C. B. Stuart, Guardian *ad litem* for said Jackson Barnett, defendant, named in cause No. 260 Equity, on the one hand and the said Gypsy Oil Company and others, being the respondents herein, on the other hand, whereby and wherein the said next friend and the guardian *ad litem* attempted to compromise and settle, release and discharge and dismiss the causes of action set up by said next friend and guardian *ad litem* in said consolidated action on behalf of said mentally incompetent Indian, a copy of said compromise agreement is in the record (R. 769, 782, 783, 784, 785). And for further relief in said cause to have the administrator of the estate of Jackson Barnett, deceased, substituted in lieu of said next friend and said guardian *ad litem* and for the docketing of said consolidated action upon the trial docket for said District Court, that they might

be tried upon their merits, and a just judgment entered therein.

That Jackson Barnett was a full-blood restricted member of the Creek Tribe of Indians, to whom an allotment of 160 acres of land had been conveyed, which lands were restricted against alienation and that said Barnett was so mentally incompetent that he could not understand the nature and value of his lands nor the nature and effect of an oil and gas mining lease thereon. (R. 758-767). That said Indian, at the time of filing cause No. 216 Equity and at the time of intervention of the United States, was about sixty years of age, and was then and at all times thereafter domiciled in Muskogee County, Oklahoma. (R. 793-796).

That on March 5, 1912, Barnett placed his thumbprint signature to an oil and gas mining lease covering said lands. The lease was in the form provided by the Secretary of the Interior in such cases and providing for a royalty of one-eighth of all oil and gas produced from said lands under such lease. (R. 39-49).

That on April 29, 1929, one Carl J. O'Hornett was by the County Court of Okmulgee County appointed guardian for said Indian. That the day following said appointment said guardian executed to certain oil operators, Cornelius and Gooch, an oil and gas mining lease on a similar form covering all of said lands, which lease was approved by the County Court. That an appeal was duly taken from the order appointing said O'Hornett as guardian to the District Court of Okmulgee County and that on the 24th day of June 1912, said Court heard said appeal cause and rendered judgment therein, finding and adjudging said appointment void and that said County Court was without jurisdiction to make the same. (See Record 697-698).

That said decision was never appealed and became final. On August 17, 1912, an offset producing oil well was drilled

close to the Barnett land, increasing the bonus value of a valid oil and gas lease thereon to $500.00 per acre. (R. 660-661).

That five days later and on August 22, 1912, said O'Hornett with full knowledge that his appointment was void, and conspiring with the lessee, Bartlett, under the lease of March 5, 1912, and, with Cornelius and Gooch, pretended assignees, under the thumbprint lease of Barnett, and, for the purpose of obtaining possession under such void lease for a nominal sum, fraudulently pretended to adopt said lease as "legal guardian of said Jackson Barnett, incompetent," Respondent's Bill in Equity 260, Par. 10 (R. 61-64). See Lease March 5, 1912 (R. 39-49). This was done by inserting the name of O'Hornett as guardian, in the thumbprinted instrument by Jackson Barnett, on March 5, 1912. This instrument so materially altered as to destroy it as the separate lease of Barnett, was thereafter presented to the Secretary of the Interior for approval as a lease executed by a duly appointed guardian for Jackson Barnett, a copy of which said lease originally thumb-marked by Barnett on March 5, 1912, and as it appeared after the alterations thereof were made and the signature of said pretended guardian had been affixed thereto as the legal guardian of Jackson Barnett, and had been approved by the Secretary of the Interior on September 13, 1912, appears in the record (R. 39-49). Respondents here now concede that, as a lease executed by O'Hornett as guardian, same was wholly void, and are seeking now to sustain the same instrument notwithstanding its alteration as the individual lease of Barnett, and one which, under the concession of the Circuit Court of Appeals, in its opinion, was held equally void. See opinion Circuit Court of Appeals, 142 F. 935, 936, 937, *supra* (In re appeal of Jackson Barnett, 122 Okla. 160). That Bartlett and his assignees, respondents

herein, went into possession under this same lease, and have occupied said lands ever since (R. 776). In 1926, the question of the validity of O'Hornett's appointment as guardian was brought before the Supreme Court of Oklahoma; that Court again declared the said appointment totally void. In re Jackson Barnett, 122 Okla. 160, *supra*.

That soon after the decision of the Supreme Court of Oklahoma the action known as 216 Equity herein was begun by Fred T. Hildt as next friend of Jackson Barnett v. Gypsy Oil Company and others seeking to cancel said oil and gas lease on the ground that the said Barnett was mentally incompetent at the time of its execution and that said lease was void and sought to recover the value of the oil and gas which had been wrongfully removed therefrom. See Amended Bill in Equity No. 216 (R. 50-55). That respondents entered their appearance in said action and, in addition thereto, filed a separate action against Barnett in which they asserted their title to the leasehold rights in the oil and gas, and sought to quiet their title thereto and to dismiss said Barnett's action. See Separate Answer and Counter-Claim of respondent in 216 Equity (R. 129-153). The guardian *ad litem* for Barnett in said action filed a counter-claim in 260 Equity, which he asserted substantially was set up in 216 Equity, alleging that Barnett's lease was wholly void because of his mental incapacity to execute the same, and that the said oil companies, respondents herein, had wrongfully removed oil and gas of the value of more than $15,000,000, and asked for judgment therefor. See Counter-Claim guardian *ad litem* (R. 77-90). The United States was notified of the pendency of both said actions in accordance with the Act of April 12, 1926, Sec. 3 (44 Stat. 240) and filed its "answer" in each said action and, instead of supporting the claims of the incompetent Indian and protecting his estate, as became its duty as

guardian, the United States filed its "answer" admitting Barnett's mental incompetency to execute the lease and alleging further that, by reason of the long occupancy of said land by the oil companies, respondents herein, and the development of oil and the payment of benefits in the form of royalties, that it was for the best interest of Barnett that his actions therein be dismissed with prejudice, and that said lease be validated and the title to the oil and gas rights be quieted in said respondents herein. See Answer of United States in No. 216 Equity (R. 91-99) and in 260 Equity. See same Answer in 216 Equity.

That said causes, after being at issue, were consolidated as No. 216 Equity Consolidated and set for trial several times but never tried (R. 749, 750, 751), but the said guardian *ad litem* and the next friend and the respondents herein entered into a compromise settlement of said litigation and executed a compromise agreement by the terms of which, for a consideration of $35,000.00, of which $20,000.00 went to the Secretary of the Interior for Jackson Barnett and the remainder as fees to the guardian *ad litem* (See compromise agreement (R. 769-772-786). See Order of Court (R. 102-104), it was agreed that the void lease under which said respondents claimed "shall be and is hereby confirmed, ratified and adopted as a legal and binding departmental oil and gas mining lease on said lands from and since the date of its execution and approval by the Secretary of the Interior September 13, 1912," and that Barnett's suits should be dismissed with prejudice and that the title and ownership of the oil and gas rights in said land be adjudged in respondents and their title therein quieted by a decree of said court, and making provision that Barnett and his heirs be perpetually enjoined from ever questioning their rights and ownership therein. A copy of which compromise agreement is set out in the record (R. 769-772-786).

Said compromise agreement purports to set forth certain facts and historical data pertaining to the history of said lease and the occupancy of said land and production of oil thereupon, but does not contain any statement showing the mental incompetency of Jackson Barnett at the time said oil and gas lease was thumbprinted by him nor at all times since, nor does it set forth any controlling fact involved in the issues of the lawsuit, but it does provide that a final decree shall be entered by the court therein, specifically setting forth the terms and provisions which said decree shall contain. That thereafter and on June 13, 1929, said compromise agreement was submitted to said court by the guardian *ad litem* upon a written application for its approval, a copy of which is shown in the record (R. 100-102). And that on said date, without any trial or hearing of any testimony or argument supporting or tending to support Barnett's causes of action, said court signed an order approving said compromise agreement, conditioned that the same before it become effective must be approved by the Secretary of the Interior and the Attorney General of the United States. A copy of said order is in the record (R. 102-104). Thereafter, said compromise agreement was approved by the Secretary of the Interior and the Attorney General of the United States (R. 771-772). Thereafter and to wit on July 11, 1929, without said cause having been set upon the docket of said Court for hearing, and without any trial or the introduction of any evidence, oral or written, or the presentation of any law or argument in support of the incompetent Indian's cause of action in said consolidated suit and upon presentation by the counsel for the respondents of the approved compromise agreement aforesaid and a decree based thereon prepared for the court's signature was submitted to the Judge of said Court and was by him signed, a copy of which final decree is set out in the record (R. 105-107). The identical relief granted and

awarded by the final judgment is that which the compromise agreement specifically stated should be granted in said decree and nothing else. Compare compromise agreement with final decree.

That Jackson Barnett died and petitioner herein was duly appointed administrator of his estate (R. 795-796). And brought this action to have the final judgment and consent decree declared void and beyond the jurisdiction of the court to enter it without a trial upon the merits and an adjudication of the controlling issues in said consolidated action praying that said decree be vacated and that the said consolidated action be set for trial and hearing upon the merits in regular course (R. 6-39). That issues were joined thereon by respondents (R. 344-373, 438-460, 421-437). On February 20, 1939, the United States, upon its own application, filed its petition in intervention in the case at Bar, alleging that said final decree was void and praying for its vacation and the setting of said consolidated cause upon its merits, and in every way supporting the administrator's action (R. 108-116). That thereafter on June 26, 1942, the United States, acting through the Department of Justice, procured an order permitting it to withdraw its intervening petition and appearance in said cause, without specifying any ground or reason therefor. An order was granted accordingly (R. 615-616). Thereafter, this cause proceeded to trial upon issues joined upon plaintiff's complaint, and on September 8, 1942, the court announced its decision and entered its findings of fact and conclusions of law (R. 616-621) wherein, among other things, said court found that:

> "The Court in consolidated cause No. 216 Equity had full jurisdiction of the parties and of the cause of action, and had full jurisdiction and authority to render the judgment therein and the particular judgment that it did render, and said judgment is valid on its face, and by the judgment rolls in said cause."

And as a conclusion of law held that the final decree in said cause was valid and no grounds existed for setting same aside (R. 621). A decree was entered dismissing plaintiff's complaint with prejudice (R. 621-622). Motion for new trial was filed and motion was denied January 8, 1943 (R. 623-633). Appeal was timely in the Circuit Court of Appeals for the Tenth Circuit and that court by its decision, expressed by Judge Walter A. Huxman, affirmed the judgment below. See footnote for pertinent portion of opinion.[7] Petition for rehearing was denied June 24, 1944 (R. 863).

The amount of the claim involved in the case at Bar exceeds the sum of $20,000,000.00 including interest under

[7] "* * * On June 13, 1929, all the parties, having agreed to a settlement of the consolidated cause, prepared a written compromise agreement. * * * The compromise settlement was approved by the guardian *ad litem* and by the next friend of Jackson Barnett. It was submitted to the court for approval by the guardian *ad litem* with the statement that it was for the best interest of Barnett and with the recommendation that it be approved by the court. It was approved in open court by the trial judge June 13, 1929, on condition, however, that it be approved by the Attorney General and the Secretary of the Interior of the U. S. It was approved by these two officers and on July 11, 1929, the cause came on for hearing for final judgment. Judgment was entered in open court approving the settlement and quieting appellees, title to the lease." * * * Appellant recognizes that to be successful he must get around the judgment in consolidated No. 216 Equity quieting appellee's title to the oil and gas lease. This he seeks to do on the ground that the judgment is void because it constituted a consent decree. It is argued that neither a legal guardian, a guardian *ad litem*, nor a next friend of an incompetent person can consent to a compromise judgment and that such a judgment is absolutely void. * * *

"* * * It is our opinion that the decree of the court was not a consent decree; that it was a judicial determination of the issues involved in the case in which it was entered, and is a valid and binding decree, and constitutes an effective bar to the prosecution of this case." * * * It may be conceded for the purposes of this opinion that Jackson Barnett was mentally incompetent and could therefore not execute a valid oil and gas lease. It may also be conceded for the same purpose that the court erred in consolidated Equity No. 216 in concluding that the ratification of the lease by the representatives of Barnett and its approval by the Attorney General and the Secretary of the Interior gave it validity. * * * 142 F. (2) 935, 936, 937, *supra*.

the provisions of Oklahoma law (Par. 27, Plaintiff's complaint No. 39 Civil R. 36).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In affirming the decree and judgment of U. S. District Court for the Northern District of Oklahoma, based upon the compromise agreement and consent of the guardian *ad litem* and next friend of the mentally incompetent, restricted Indian, without more, and without judicial investigation and determination.

2. In holding that the decree of the U. S. District Court based upon the compromise agreement and consent without more, and without judicial investigation and without judicial determination was not a consent decree, but that it was a judicial determination involved in the case in which it was entered.

3. And that the decree of the U. S. District Court is valid and binding on the mentally incompetent and restricted Indian and constituted an effective bar to the prosecution of this case.

4. The Circuit Court of Appeals erred in refusing and failing to reverse the decree of the U. S. District Court and holding that the decree based on the compromise agreement was void and without force and effect.

5. Said Court also erred in refusing to vacate and set aside the consent decree of July 11, 1944, entered in said consolidated action in the District Court and that said action be set for hearing upon the merits thereof after substituting the administrator of the estate of Jackson Barnett in lieu of the next friend and guardian *ad litem*.

Reasons for Granting the Writ

The decision of the Circuit Court of Appeals below that the decree entered by the District Court was not a consent decree based solely on a compromise agreement but that it was a judicial determination of the issues involved in the case and is a valid and binding decree as against the rights of the restricted, mentally incompetent Indian and constituted an effective bar to the prosecution of this case has decided an important question of local law of the State of Oklahoma in a way probably in direct conflict with well-settled applicable local decisions of the Supreme Court of the State of Oklahoma, and is in direct conflict with the case of *Tucker* v. *Leanord,* 144 Okla. 264, 291 Pac. 124; and other cases to the same point. See footnote.[8] In which cases the court there held, with reference to the effect of orders purporting to approve settlements made by guardians and representatives of restricted, incompetent Indians under agreements entered into for the purpose of avoiding judicial investigation and determination of the Indian's rights, that these orders are not and do not purport to be a determination of the rights of the plaintiff. They are, at best, only a conclusion of the court that it would be for the best interest to take the money rather than try the lawsuit.

The Oklahoma Supreme Court, after reviewing the authorities on this point, flatly held that the attempted action of the lower court (District Court of Oklahoma) was

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[8] *Griffin* v. *Galbraith*, 114 Okla. 208, 247 Pac. 339; *Title & Guaranty Surety Co.* v. *Foster, et al.*, 84 Okla. 291, 203 Pac. 231; *Harjo* v. *Johnston, et al.*, 187 Okla. 561, 104 Pac. (2) 985; *Lowery* v. *Richards*, 120 Okla. 261, 248 Pac. 622; *In re Sanders Estate*, 67 Okla. 3, 168 Pac. 197; *Bolling et al.* v. *Campbell*, 36 Okla. 671, 128 Pac. 1091; *Neal* v. *Travelers Inc. Co.*, 188 Okla. 131, 106 Pac. (2) 811; *Tidal Oil Co.* v. *Flannegan*, 87 Okla. 231, 237; *Colins Investment Co.* v. *Beard*, 46 Okla. 310; *Brewer* v. *Dodson*, 60 Okla. 81; *Bell* v. *Fitzpatrick*, 53 Okla. 574, 157 Pac. 334.

void, going on to say that the jurisdiction of the District Court of Creek County, Oklahoma, was limited to a determination of the issues presented by the pleadings in the case, and it was the duty of the lower court to render judgment for or against the plaintiff without regard to whether or not it was for the best interest of the plaintiff; as a matter of fact, the best interest of the plaintiff was not involved in that controversy, and, when the court was asked to approve a settlement made between the next friend of plaintiff (as in the case at Bar) and defendant, it was the duty of the court to decline to make any order with reference to the matter. The orders were beyond the jurisdiction of the court and were void.

The case of *Tucker* v. *Leonard, supra,* and companion cases cited in the footnote, is the well settled and consistent body of the law of the State of Oklahoma, which has been consistently followed before and since statehood regarding the disposition of property rights of restricted, incompetent Indians, and was declared to be the law by the Courts of the Territory of Oklahoma before statehood in the leading case of *Goodrum* v. *Buffalo,* 162 Fed. 817.

These decisions of the Supreme Court of the State of Oklahoma conform to and are in accord with the policy and law of the United States with reference to the property of the Indians.

The decision of the Circuit Court of Appeals is in direct conflict with the principles of law decided by this Court in *Kelly* v. *Town of Milan,* 127 U. S. 139 at 159, 160, 32 L. Ed. 77 and 8 S. Ct. 1101, in which this court held referring to and reviewing the decree of the lower court based on a compromise and consent agreement as in the case at Bar, this court in substance said: This was no adjudication by the court of the validity of the bonds on the submission to it as a judicial tribunal of the question of such validity. The declaration of the validity of the

bonds, contained in its decree, was made solely in pursuance of the consent to that effect contained in the agreement signed by the Mayor of the Town and an Officer of the New Orleans, St. Louis and Chicago Railroad Company. The act of the Mayor in signing the agreement could give no validity to the bonds if they had none at the time of the agreement being made. The want of authority to issue them extended to the want of authority to declare them valid. The Mayor had no such authority. The decree of the Court was based solely on the declaration of the Mayor, in the bill in Chancery, that the bonds were valid.

The adjudication in the decree can not, under the circumstances, be set up as a judicial determination of the validity of the bonds. This is not a case of the submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision by a person who had no right to bind the Town by such consent, because it gave life to invalid bonds and the authorities of the Town had no more power to do so than they had to issue the bonds originally.

The decision of the Circuit Court of Appeals is in conflict with the principles of law declared by this court in *Texas & Pacific Railway Company* v. *Southern Pacific Company*, 137 U. S. 48, 56, wherein this court held that where a decree is entered by consent based on an agreement or compromise agreement of the parties, it is not a decree based on judicial investigation and judicial determination, but that, in entering it, the court merely exercises an administrative function in recording what had been agreed to between the parties. For other cases see footnote.[9]

The decision of the Circuit Court of Appeals below is in conflict in principle and policy with the decision of this

[9] *Russel* v. *Place*, 94 U. S. 606, 609, 610. Manhattan Life Insurance Co. v. *Broughton Trustee*, 109 U. S. 121, 125; *Fitz Henry Hommer, Plaintiff in error*, v. *George L. Brown*, 16 Howard (57 U. S.) 354, 365, 366.

Court as held in *Heckman* v. *United States*, 224 U. S. 413, and as followed in *Goat* v. *United States*, 224 U. S. 458, and involving transactions by the mentally incompetent, restricted Indian, Jackson Barnett, see *Marshall L. Mott* v. *United States*, 283 U. S. 747-753; *United States, petitioner*, v. *Equitable Trust Co., et al.*, 283 U. S. 738-747; in which this Court held attempts to alienate his property and rights thereunder because of his mental incompetency, even where the same were approved by the Secretary of the Interior, representing the United States, were set aside because of the mental incompetency of said Jackson Barnett and generally in all these cases, this Court upheld the restrictions applying to Indians generally in reference to the alienation of their property and rights thereunder, and especially applicable to mentally incompetent, restricted Indians and which includes a decree as in the case at Bar, based upon a compromise agreement and consent without judicial investigation and determination.

We also believe that the decision of the Circuit Court of Appeals is in conflict with the decisions of the Circuit Court of Appeals of the Eighth Circuit in the case of *Jennings* v. *Wood*, 192 Fed. 507, wherein the court there held that the Secretary of the Interior could not approve an invalid lease and by such approval make an invalid lease valid, and said decision also conflicts with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Holmes* v. *United States*, 33 Fed. (2) 688, to the same effect.

The decision of the Circuit Court of Appeals is in direct conflict with the decision in *Goodrum* v. *Buffalo*, 162 F. 817, decided by the Eighth Circuit Court of Appeals, in which the court said: That the disability of these Indians is imposed by statute, it must therefore follow that the record and judgment of a court disclosing on their case (as in the case at Bar) that the disqualified Indian was

entering into an agreement for the submission of the question of his rights to dispose of his lands, was in no wise different from such a proceeding participated in by a minor infant, and that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian's allotments during the period of such limitation are abortive and this for the palpable reason that it is a period of absolute disability. For the other cases and Text Work in conflict in principles see footnote.[10]

We also believe that the decision of the Circuit Court of Appeals is in conflict with the decision in *City of Baton Rouge et al.* v. *Baton Rouge Water Works Co.*, 30 F. (2d) 895, 897, Fifth Circuit Court of Appeals, and which involved a compromise and consent decree, and the court there held that the entry of such a decree was not based on an adjudication by the court, but an embodiment of an agreement of the parties and that, if the Louisiana Constitution stood in the way of an agreement for irrevocable rates, it would likewise stand in the way of a compromise decree attempting to sustain such an agreement.

From all the foregoing, we think it is clearly apparent that the Circuit Court of Appeals has decided an important question of local law of the State of Oklahoma in a way probably in conflict with the consistent and well settled decisions of the Supreme Court of that State. And has decided a federal question in a way probably in conflict

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[10] *Hodgson* v. *Vroom*, 266 Fed. 267; *American Radium Co.* v. *Hipp et al.*, 279 Fed. 601; *Kelly* v. *Town of Milan*, 21 Fed. 842, affirmed by this court, 127 U. S. 139, 32 L. Ed. 77; *Bergman* v. *Rhodes*, 165 N. E. 598, 65 A. L. R. 344; *Heyman* v. *O'Connell*, 13 N. E. (2) 100; Mr. Freeman in his work on Judgments, 5th Ed. Vol. 3, Sec. 1350, p. 2773, says: "The consent judgment is, undoubtedly, contractual in its nature, and should be construed as though it were a contract.

"It is based wholly upon the agreement of the partise with respect to the matter in controversy in the action, and involves no judicial inquiry into, or preliminary adjudication of the facts or the law applicable thereto. The agreement or consent renders this unnecessary and improper."

with the applicable decisions of this court. And the decision is in direct conflict with the decision in *Goodrum* v. *Buffalo, supra,* of the Eighth Circuit Court of Appeals and the decision in *City of Baton Rouge, et al.* v. *Baton Rouge Water Works, supra,* of the Fifth Circuit Court of Appeals.

As heretofore stated, the amount claimed in the case at Bar exceeds the sum of $20,000,000.00 including interest provided by Oklahoma law. (Par. 27, Plaintiff's Complaint No. 39 Civil R. 36).

We think that the granting of the writ of certiorari is justified by the rule in *Marshal L. Mott* v. *United States,* 283 U. S. 747, 753; *Royal Indemnity Company* v. *United States of America,* 313 U. S. 289, 293; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 296; *International Railway Co.* v. *Davidson,* 257 U. S. 506, 510; *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163; *General Electric Company* v. *Wabash Appliance Corporation,* 304 U. S. 364; The *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.,* 307 U. S. 350.

The questions presented are of general and considerable importance to the public dealing with Indians and with Indians' transactions with the public, and if the decision of the Circuit Court of Appeals below is permitted to stand it will create confusion in transactions of this character in the future as said decision may affect wealth and property of vast amounts; and tends toward confusion in the application and administration of the law as declared by the decisions of the Supreme Court of Oklahoma, the decisions of this Court and the Lower Federal Courts, all of which are in conformity and accord with the general law and policy of the United States in dealing with the Indians, in protecting their rights and in preserving their property and wealth.

We think it is apparent that the problem here presented is likely to constantly recur unless finally settled by this

court and the questions presented are justiciable, of gravity and of general importance.

Therefore, it is respectfully submitted that this petition for writ of certiorari be granted.

November, 1944.

Respectfully submitted,

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BRIEF

Statement of Facts

The facts are stated in the petition, pages 6-14.

Argument

The Reasons For Granting the Writ and the authorities in support thereof are discussed sufficiently in the petition as to obviate the necessity of repetition in the brief and only a summary of the facts, law and argument will be presented here.

The Court below (CCA), in its opinion, rested its decision on the following statement:

> "It is our opinion that the decree of the court was not a consent decree; that it was a judicial determination of the issues involved in the case in which it was entered, and it is a valid and binding decree, and constitutes an effective bar to the prosecution of this case."
>
> "This is not a case in which the parties agreed as to the judgment which should be entered, submitted to the court, and had the court, pro forma enter the judgment upon which they had agreed, without an independent judicial inquiry and determination of the issues involved in the case." (142 Fed. (2) 935, 937).

In arriving at its conclusion above the Circuit Court of Appeals conceded certain vital facts involved in the determination of the questions to be established thus; first, that Jackson Barnett was so mentally incompetent that he was incapable of executing a valid oil and gas mining lease on his allotted lands and that the lease in question was void; second, that the trial court in consolidated cause 216 Equity committed error in finding and concluding that the ratification of the lease by the representatives of Bar-

nett and its approval by the Attorney General and the Secretary of the Interior gave it validity.[11]

The foregoing conclusions of the Circuit Court of Appeals narrow the questions to be here briefed and discussed.

First, did the Circuit Court of Appeals err in its conclusion that said decree was not a consent decree, but an adjudication of the issues raised by the pleadings in Consolidated Cause 216 Equity?

Second, did the trial court have jurisdiction to enter the decree it did in said cause?

Taking up these questions:

Point I

Said Circuit Court of Appeals committed error in its conclusion that such decree was not a consent decree as defined and recognized in the general law of the land and in the decisions of this court and of the Circuit Courts of Appeal and State Courts and by leading authors and text writers.

The court's conclusion that the Final Decree herein was based upon a judicial determination of the issues in Consolidated Cause No. 216 Equity is so contrary to and wholly unsupported by the record, as to lead to the belief that the court has disregarded all the pleadings and facts, including the terms and provisions of the compromise agreement and of the decree itself.

Thus one of the defenses set up by respondents was that the compromise settlement was the basis for a consent decree against Jackson Barnett, incompetent, and that as

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11 "It may be conceded for the purpose of this opinion that Jackson Barnett was mentally incompetent and could therefore not execute a valid oil and gas lease. It may also, for the same purpose, be conceded that the court erred in Consolidated Equity 216 in concluding that the ratification of the lease by the representatives of Barnett and its approval by the Attorney General and the Secretary of the Interior gave it validity." 142 Fed. (2) 935, 937.

such there could be no review or impeachment thereof in the manner the same is here sought to be reviewed.[12]

The United States in its role as guardian of Jackson Barnett, was unwilling to submit the question to the court for adjudication, which the compromise agreement was intended to avoid. Thus, in his letter of December 21, 1927, the Assistant Attorney General objects to submitting to the court the question as to the power of the Secretary to make a new lease for Barnett, reminding the District Attorney that it has been frequently decided that a lease or contract to convey allotted property of Indians of the Five Civilized Tribes must be initiated by the Indian owner. (R. 728)

That the counsel representing respondents understood well the character of the decree to be purely a compromise settlement decree approving the settlement which had been "O. Ked" by "all the parties to the Action" including the United States District Attorney. See letter of Diggs, Coun-

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[12] In paragraph 5 of the Amended Answer of the Gypsy Oil Company et al. (R. 399-400) where, referring to the compromise agreement and decree, it is alleged that:

> "• • • the United States, acting by and through the Secretary of the Interior Department, and by its Department of Justice, acting by and through its Attorney General, approved the compromise agreement and settlement complained of in the plaintiff's complaint herein and so recommended and caused the same to be carried into final effect, by the rendition and entry of the final consent decree in this action sought to be reviewed."

In paragraph 13 of the same pleading (R. 407) this appears:

> "The final decree of July 11, 1929 rendered and entered in Consolidated Cause No. 216 Equity was a decree rendered by consent of all the parties to cause No. 216 Equity, and Cause No. 260 Equity—consolidated by order of this court and afterward known as Consolidated cause No. 216 Equity, and as such consent decree is not subject to review or to be impeached or set aside in the manner that the same is sought to be reviewed or set aside in this action, in that the plaintiff's complaint herein fails to disclose any error of law appearing on the face of the record in Consolidated cause 216 Equity • • •"

sel for Respondents, transmitting said compromise to the Attorney General for approval. (R. 742).

The First Assistant Secretary of the Interior Department entertained no doubt that by the agreement and the approval of it by the court, there would be a "final settlement of Barnett's claim" and that was to be effected by "a ratification of his lease as of the date of its execution without regard to whether it may have been void" (R. 738).[13]

One of the purposes of the agreement is clearly set forth in the record (R. 744) where the U. S. District Attorney, in transmitting the agreement to the Attorney General, says:

> "I also understand that the prospective settlement carries no finding or conclusion as to Jackson Barnett's mental condition."

It was clearly the intention of the departments of the United States that there should be no judicial determination entered in the cause which determined any right of Barnett under the issues of the suit, as is shown in the same communication (R. 744) which states as set out below.[14]

The petition for the approval of the compromise agreement recites:

> "That a compromise agreement had been reached between the parties to this action, which had been executed in quadruplicate, and is herewith submitted to the court for its inspection, and with the request that it be approved." (R. 100).

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[13] "By the compromise agreement and the above mentioned order, the validity of the lease is recognized and the lease is ratified and confirmed and adopted as a valid instrument from the date of its execution."

[14] "In appearing I suggested to the court that I desired no order entered except one that was thereafter to be approved by you and the Department of the Interior, and having made this suggestion theretofore to the counsel, I was advised that the order had been prepared in keeping with such suggestion. * * *"

Then follows the prayer that "* * * this Honorable Court enter an order herein approving the compromise agreement * * *". No request was made to the court to decide anything save and except whether it would or would not give its approval to said agreement. In his letter of May 14, 1929 (R. 747) the Assistant U. S. Attorney, representing the Government in said cause, makes it clear that there was to be no judicial hearing or trial nor any finding of fact by the court and consulted the attorney for the Gypsy Oil Company, one of the respondents herein, and was advised "that no trial or finding was anticipated and that the settlement would be submitted to the court as a settlement * * *".

The Assistant District Attorney understood that the purpose of the settlement was to give effect to a void lease, and was unable to understand how such result could be accomplished by an agreement between the parties to the suit.[15] (R. 747). He also clearly understood, as did the parties to the compromise agreement, that its purpose was to avoid any judicial inquiry into the validity of the lease which the agreement purported to ratify. And he knew, as did the Attorney General (R. 728), that the question of the power of the Secretary of the Interior to make a lease for Jackson Barnett should not be submitted for judicial inquiry.

The whole purpose of the compromise agreement was to avoid a judicial determination of the issues in the suit knowing that, if there were such trial, the judgment of the court must follow numerous decisions of this court and of the Circuit Courts of Appeal and of the State Court sus-

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[15] (Assistant District Attorney—to Attorney General):

"Since a failure of consideration is not an issue in this case, I am unable to understand how the payment of $35,000 *can make a void lease valid.*"

taining the rights of Jackson Barnett (see authorities cited in petition) and that the respondents herein resorted to a scheme and device by which they sought to avoid an adverse decision upon the merits of the suit and procured a consent judgment under an agreement with the representatives of Barnett who were incapable of binding Barnett to such judgment.

The further proof, if there be any further proof needed, that there was no hearing or trial had upon any of the issues involved in the Consolidated cause 216 Equity, nor were any facts discussed, nor law presented touching same, is conclusively shown by the statements of R. H. Wills, Attorney for Mid-Continent Petroleum Corporation (R. 670, 671), John M. Goldesberry, United States District Attorney (R. 672-677) and James B. Diggs, Counsel for Gypsy Oil Company, *et al.*, respondents (R. 677-684), showing conclusively that there was no trial or hearing upon any issue in said Consolidated cause, notwithstanding the statement in the opinion of the Circuit Court of Appeals to the effect that these witnesses sustained the conclusion of the court that there was a hearing upon the issues of the cause. (R. 827) 142 F. (2) 935-937). There is an abbreviated statement of the material parts of testimony of these witnesses —as to what proceedings were had—when both the compromise agreement and the Final Decree were presented for signature of the court, one on June 23, 1929, the other on July 11, 1929—which reduced statement appears as an Appendix to Petition for Rehearing, in the Circuit Court of Appeals (R. 859-862).

The language of the decree itself has closed the door upon any contention that there was any judicial investigation into the issues of law and fact set up in said Consolidated cause—by its recital:

> "* * * that Jackson Barnett, by and through his representatives, has ratified, confirmed and adopted

the Departmental oil and gas mining lease executed by him on March 5, 1912, to H. U. Bartlett."

The record affirmatively shows that there was no judicial investigation essential to any determination of the mental competency of Barnett to execute the lease, and affirmatively shows that none of his representatives had power to ratify it for him.

The compromise agreement sets forth the detail of facts which these representatives of Barnett and these respondents saw fit to incorporate therein (R. 769, 772-782-786) and upon this detail of facts declare their agreement of compromise (769, 782-785) and set forth what the court's decree shall contain, in exact terms (R. 769, 784-785), and submit no fact or law upon which the court shall judicially pass judgment; and submit to the court a request for its approval of what the parties have, in all things, agreed the judgment shall be. (R. 100-107).

The only function performed by the court was to give its approval to the terms and provisions of the compromise agreement as an administrative function in recording what had been agreed to between the parties. *Texas & Pacific Ry. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, 56.

Therefore, petitioner asserts that the Circuit Court of Appeals committed error in its conclusion that the final decree entered in Consolidated 216 Equity was not a consent decree but was a judicial determination of the rights of the patries thereto under the issues of said cause.

Point II

As an incident to such error, the next question to be determined is whether the representatives of Jackson Barnett had any legal capacity to bind said Barnett, incompetent, to the terms and conditions of said compromise agreement and judgment.

It is fundamental that a mentally incompetent person is incapable of entering into any contract. This court in 1872, in *Dexter* v. *Hall*, 15 Wall. 9, 21 L. Ed. 73, laid down the following rule as determining the status of an unadjudicated, mentally incompetent person, with reference to his capacity to make contracts which will be binding upon him, under which rule Barnett was without capacity to contract. That decision has been followed uniformly by this and all the federal courts since that time. This court, at page 20 stated:

> "The fundamental idea of a contract is that it requires the assent of two minds, a lunatic and a person *non compos mentis* has nothing which the law recognizes as a mind; and it would seem, therefore, upon this principle he cannot make a contract which may have any efficacy as such."

It is as fundamental that no one can represent Barnett in making a binding contract the effect of which is to divest him of his ownership or title to his property and transfer the same to others.

The Circuit Court of Appeals in its opinion has decided and conceded that the representatives of Barnett, all of them, which includes the guardian *ad litem* and the next friend and Secretary of the Interior and the Attorney General, all that were recognized by any of the courts below, had no authority to legally bind Barnett to the terms of the agreement upon which the consent judgment was entered.

Under the State laws of Oklahoma and decisions construing those laws, a guardian *ad litem* cannot compromise and settle the suit or action brought for his ward or incompetent. Revised Statutes of Oklahoma, 1941, title 12, Sec. 279 (1931 Stat. Sec. 213). See authorities cited in Petition, especially *Tucker* v. *Leanord, supra.*

Under this statute and the decisions, the State courts are without jurisdiction or power to enter upon the dockets of said courts any judgment of compromise without hearing all the facts constituting the cause of action of the minor or incompetent person in a regular trial of the issues of said suit.

The State statutes and decisions touching this question shall be followed and enforced under the decision of this court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 88, and under Sec. 725, Title 28 U. S. C.

The same principle was set out and followed in *Goodrum* v. *Buffalo,* 162 Fed. 817, and other federal cases. *Fulsom* v. *Quaker Oil Co.,* 28 Fed. (2) 398; and *Adams* v. *Osage Tribe of Indians,* 50 Fed. (2) 918, 920.

In *Goodrum* v. *Buffalo, supra,* 8th C. C. A., in 1908, it was held that a legal guardian of a minor had no authority to bind his ward to a stipulation of facts submitted to the court upon which stipulation judgment was entered against the minor in an action to vacate a deed by said minor to allotted lands executed in violation of restrictions against alienation thereof under the Acts of Congress applicable thereto. This case has been followed and cited in numerous decisions by both federal and State Courts, many of which are set out in the petition.

Congress has provided the only method by which the property rights of Jackson Barnett could be divested and transferred to others. Sec. 2 of the Act, approved May 27, 1908, 35 Stat. 312. See footnote 1 of the petition. This statute provides the only method by which the title of the oil and gas under Barnett's lands could be leased legally and that is by and through a legally appointed guardian under the laws of the State of Oklahoma making provision therefor. There being no duly appointed guardian to represent Barnett, there could be no valid lease executed

by him and therefore there is no valid lease in existence under which said respondents might claim rights.

We should call attention of the court to the appearance in the compromise agreement and consent judgment of the names of two alleged legal guardians, McCullom and Hall, of Jackson Barnett, appointed in Creek and Okmulgee Counties, respectively, Oklahoma, in the year 1927, who appear as parties to said contract. These two alleged guardians procured their alleged appointments, one in Creek County, Oklahoma, and the other in Okmulgee County, Oklahoma, upon the representation that Barnett was a citizen of California who owned land in said respective counties of Oklahoma (R. 810-811-812) and a person "subject to guardianship", said appointments being made under the provisions of Sec. 6570 Revised Laws of Oklahoma, 1910, which provides for * * * "persons liable to be put under guardianship according to the provisions of this chapter, and who reside without this State, and have estate therein." Barnett was a citizen of Oklahoma but had been theretofore and was when said appointments were made, temporarily residing in California, with his legal domicile in *Muskogee* County, Oklahoma, where petitioner was appointed as administrator of his estate upon the death of said Barnett (R. 793-796). Under the provisions of Sec. 1449 Revised Laws of Oklahoma, 1921, providing for the appointment of guardian for a mentally incompetent person, it was required that the incompetent must be a resident of the County in which said appointment was made and must be personally present at the time said appointment was made. *Hathaway* v. *Hoffman*, 53 Okla. 72, 153 Pac. 184. And further that there is no jurisdiction under that statute to appoint one beyond the limits of the County of his residence. *Welch* v. *Focht*, 67 Okla. 275, 171 Pac. 730; *State ex Rel. Monahawee* v. *Hazelwood*, judge, 81 Okla. 69, 196 Pac. 937; *Martin* v. *O'Reilly*, 81

Okla. 261, 198 Pac. 303. These appointments were both totally void and neither of said alleged guardians were recognized by any of the lower courts having to do with the Barnett suits, including the Circuit Court of Appeals.

After the Supreme Court of Oklahoma in 1926 had held that Carl J. O'Hornett, who pretended to adopt the thumbprint lease of Barnett of March 5, 1912, "as legal guardian", had never been legally appointed as such guardian (In re Appeal of Jackson Barnett, *supra*); and the action 216 Equity had been brought against respondents for the value of the oil removed by them amounting to millions of dollars, they realized that they had no valid title to the oil and gas removed and were liable therefor. They then began a plan and scheme to defeat the claim, first, by bringing a counter suit against Barnett, incompetent, in which they attempted to set up claims of equitable rights to the oil and gas by reason of their long occupancy of the land under the void lease, and their development of the oil thereon and the payment to the Secretary of the Interior of benefits in the form of "royalties" under said void lease and pleaded equitable estoppel against this incompetent Indian by reason of his silence and failure to assert his claim. See paragraphs of Respondents' Bill 260 Equity, pars. 20, 21, 22, 28, 29, 30 (R. 66-68, 73-77). They also prayed for a judgment vesting them with the ownership of the oil and gas under said lands and for quieting their title to the same and enjoining Barnett and his heirs from ever asserting title thereto (R. 76-77). They also induced the Interior Department to request the Attorney General of the United States to intervene in said action, ostensibly under the provisions of the Act of April 12, 1926, 42 Stat. 240, but in fact to espouse the cause and claim of Respondents herein instead of defending and protecting the Indian's rights, as their duty as guardian required (R. 715-722, 726-727) and, while admitting in said intervention

in both of said actions, that Barnett was a mental incompetent and incapable of making a valid lease, yet, by reason of Respondents' long possession of the lands and the development thereof and the payment in the form of royalties to the Secretary of the Interior of benefits for the use of Barnett, that it would be inequitable to deprive said respondents of said oil and prayed for the dismissal of Barnett's suits and the quieting of the title to said oil and gas in said respondents and for all the relief prayed for by the respondents (R. 91-99).

After consolidation of said actions as Consolidated 216 Equity, the same was set for trial several times (R. 749, 750, 751), but never tried. The respondents, instead, resorted to the next step in avoiding a judgment against them, which was inevitable, if the action was tried upon the merits, by effecting a compromise agreement and settlement, by the terms of which it was agreed by the guardian *ad litem* and the next friend and respondents that the void lease of Barnett would be, by Barnett, "ratified, confirmed and adopted" as a "valid lease from the date of its execution, March 5, 1912" and that the title of the respondents to the oil and gas in said lands be forever quieted, and that Barnett's action be dismissed with prejudice and that said incompetent Indian and his heirs "be perpetually enjoined from claiming any right, title or interest thereto," and further that the court having jurisdiction shall enter a judgment in accordance with the exact terms and conditions of the agreement above stipulated. (R. 105-107, 769, 772-785-786). That said presiding judge declined to approve said agreement and to enter said decree, until after said agreement had been fully approved by the Secretary of the Interior and the Attorney General. That thereafter the Secretary of the Interior and the Attorney General of the United States were urged and requested by the respondents to give their approval to said compromise agree-

ment and to such decree (R. 715-722, 726-727) and did on the 26th and 27th days of June, 1929, affix their approval thereto. (R. 771-772). That after the approval aforesaid the presiding judge signed the decree.

Thus ended the plan and scheme which these respondents devised and followed, to evade and escape the judgment of the court and the law, which would compel them to restore to said Indian his rightful property amounting to millions of dollars, by resorting to a fraudulent deprival of this Indian, whose representatives failed to protect him and discharge their duties as such representatives, of his constitutional right of a trial of his cause on the merits and by procuring the entry of a consent decree upon stipulations and agreements by parties wholly unauthorized to represent him, secured a judgment which the court was without jurisdiction or power to enter. All in violation of the Due Process clause of the Fifth Amendment to the Constitution of the United States and Sec. 2 of the Act of Congress, approved May 27, 1908, *supra*, and of the decisions of this court, and other federal and state courts. See authorities cited in the petition.

Point III

The trial court was without jurisdiction to render and enter the decree it did in Consolidated 216 Equity, the effect of which decree and judgment was to divest said incompetent Indian of his ownership and title in seven-eighths of all his estate and vest the same in others in a manner violative of the Acts of Congress set forth in petition herein making provision for the exclusive manner of transferring rights and ownership therein to other persons.

In its opinion the Circuit Court of Appeals, after conceding that the judgment of the District Court was erroneous in holding that the representatives of Barnett by ratify-

ing the admittedly void lease, gave it validity used the following language:

> "The court had jurisdiction of the subject matter and of the parties to the controversy. Jurisdiction of the subject matter includes power to determine with binding effect every justiciable issue involved. Such jurisdiction is not limited to deciding issues correctly." 142 F. (2) 935-937.

The foregoing statement correctly states the principle but the court cannot apply that principle to the facts disclosed by the record in this case as this record conclusively establishes that no justiciable issue was determined, as we have argued and shown under Point I. There can be no question that the trial court had jurisdiction over the parties and the subject matter of Consolidated 216 Equity and had there been a trial and hearing upon the question of capacity of Barnett to execute the lease and the testimony thereon heard by the court and the law applicable thereto presented and had the court rendered its decision upon such trial and issues, the opinion of the Circuit Court would have stated the correct conclusion. *Swift & Company* v. *United States*, 276 U. S. 311, cited by court in its opinion, can have no application whatever as authority for its conclusion upon this decree.

The decree under attack in the case at Bar was in no sense a decree upon any justiciable issue involved but was purely a judgment upon a consent by parties pretending to represent the incompetent, restricted Indian, none of whom had any authority to bind said Indian to such stipulation, and in the court's conclusion that said decree was binding upon Barnett and his heirs, even though the decree was erroneous, is another way of saying that the trial court could enter a decree outside the issues of the suit and without a trial or adjudication of any of the issues which we declare not to be the law. The Circuit Court of Appeals has over-

looked the applicable principle set out by Freeman on Judgments, 5th Ed., Vol. 1, Sec. 354, p. 734, wherein he states the correct rule as to "lack of jurisdiction to enter any judgment outside of the scope of the pleading and the issues thereof.[16]

Under this rule the court was without jurisdiction to enter any judgment which would be binding on Barnett, the incompetent, first, because the sole basis of the judgment was by reason of a consent agreement, which in terms authorized and directed the form and contents of the decree; second, the parties representing Barnett were without any authority or power to bind him to said consent judgment; third, the court was without jurisdiction to enter any decree binding on Barnett without a trial and hearing and an adjudication of the issues involved in the action. We again cite and rely on authorities cited in the petition.

Conclusion

The petitioner respectfully urges that the writ of certiorari be granted and the case considered by this Honorable Court, and the order and judgment of the Circuit

[16] "Whether the court lacked power to act in the first instance, by reason of its failure to acquire jurisdiction over the subject-matters, or the parties, or having been invested with such power, proceeded to make a determination outside or beyond the legitimate scope thereof, the result is the same. In either case, the vitalizing element is lacking—the power to decide—without which no force or conclusiveness can be claimed for the judgment. Hence, though the court may have acquired the right to act in the cause, and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightly exercise under the law of its organization, is subject to collateral attack for want or excess of jurisdiction, even though the parties may have acquired or consented to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition of the litigants can confer a power upon the court which the law does not authorize it to exercise."

Court of Appeals of the Tenth Circuit Court and the District Court be reversed and that petitioner have such further and other relief to which he may be entitled.

Respectfully submitted,

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